In The

Supreme Court of the United States

78-337

October Term, 1978

No.

LIVSHA SHAPIRO,

Petitioner,

vs.

TOWNSHIP OF EAST WINDSOR,

Respondent.

LIVSHA SHAPIRO,

Petitioner,

vs.

BOROUGH OF HIGHTSTOWN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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LIVSHA SHAPIRO,

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vs.

BOROUGH OF HIGHTSTOWN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the order and judgment of the Supreme Court of New Jersey rendered in these proceedings on May 30, 1978.

OPINION BELOW

The order of the Supreme Court of New Jersey appears at Attachment A, *infra*, page 15. The opinion[1] of the Appellate Division of New Jersey appears at Attachment B, page 16. The opinion[2] of the Appellate Division of New Jersey, Attachment C, appears at page 19. The December 17, 1974 excerpts of the Division of Tax Appeals of the State of New Jersey appears at Attachment D, page 24. The November 4, 1976 excerpts of the Division of Tax Appeals of the State of New Jersey appears at Attachment E, page 27.

JURISDICTION

The order and judgment of the Supreme Court of New Jersey was entered on May 30, 1978, see Attachment A, page 15, *infra*. This petition for certiorari was filed less than 90 days from this date aforesaid. The jurisdiction of the Court is involved under 28 U.S.C. Section 1257(3).

THE QUESTION PRESENTED

I. Whether denial of due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution is reversible error where

(a) Res Adjudicata is disregarded as a public policy;

(b) A void consent judgment is affirmed on appeal on the same facts;

(c) Procedural burden of carrying the burden of proof is arbitrarily rejected where joinder by parties in a consolidated appeal includes prior judicial admissions and waiver.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law or equal protection of the law."

STATEMENT OF THE CASE

The petitioner herein is the owner of premises known formerly as Block 12 Lot 1Q in the Township of East Windsor, Mercer County, State of New Jersey, a respondent, and additional land in the contiguous taxing district of the Borough of Hightstown, Mercer County, State of New Jersey, a respondent, known as Block 1 Lot 4, Block 10 Lot 11, and Block

11 Lot 21, and also appurtenant to said Block 12 Lot 1Q. The total area of the properties above includes about 46 tillable acres in East Windsor and about 15 tillable acres in Hightstown and has been farmed as one unit historically and during the years 1969 through 1977 (DbH-1, 2, 4) (TA38-22 to Ta40-11),*(T21-10) (T87-13 to 15). In 1973 wheat thereon, about 60 acres, planted and harvested in 1974, and rye thereon, about 25 acres, planted in 1974 and harvested in 1975 (TA8-16) (TA13-3, 4) (T62-17 to 21), without any change in continuous farm use (T60-14 to 20) (T84-9 to 12) (T88-17, 18). Since 1970 farming operations on these properties have been carried on by the petitioner's brother, Paul Shepard who is a member of the New York Bar and had farmed this property previously (T-1 to 6) (T21-10, 11, 12).

The petitioner applied for farm assessment under the Farm Assessment Act of 1964, as amended, N.J.S.A. 54:4-23.1 *et seq.* for 1971, 1972, 1973 and 1974, and after judgments against her by the Mercer County Board of Taxation appealed to the Division of Tax Appeals, the matter was heard on December 17, 1974. The respondent Township of East Windsor appeared in accordance with the calendar; the respondent Borough of Hightstown was not placed on the calendar and did not appear before the Division of Tax Appeals on said appeal.

At the said appeal before the Division of Tax Appeals East Windsor by its attorney promised the court that he would file written stipulations removing from the court's consideration the years 1971 and 1972 (TA4-10 to 17) (Attachment D, p. 24). The court gave a consent judgment qualifying petitioner's property in question for farm assessment under said Farm Assessment Act for 1973 (TA38-22 *et seq.)* (Attachment D, p. 24) with findings

* TA—Division of Tax Appeals, 1st appeal 12-17-74.

that the petitioner taxpayer was entitled to the benefits of the Farmland Assessment Act for 1971 and 1972 as well but was limited to 1973 because of the promised stipulations (TA40-2 to 11) (Attachment D, p. 24). The stipulations were never filed with the court. The judgments and findings were affirmed by the Appellate Division including the year 1974.

Thereafter the petitioner's appeal against the respondent Borough of Hightstown for 1973 and 1974 came to be heard before the Division of Tax Appeals on October 17, 1975 for farmland assessment under the Farmland Assessment Act of 1964 as amended, after judgments against the petitioner by the Mercer County Board of Taxation on said property in Hightstown. The respondent East Windsor joined the respondent Borough of Hightstown in the appeal in a consolidated action (T3-4 to 19) (T20-6 to 10), for the years 1971 thru 1974 excepting 1973 for East Windsor property and 1973 and 1974 for Borough of Hightstown, having given petitioner Farm Assessment for 1971 and 1972 but including Block 12 Lot 1A which was part of Block 12 Lot 1Q in East Windsor but was arbitrarily separated by the assessor in 1973 because of an alleged taking for a proposed highway Block 12 Lot 1B of a strip of land across Block 12 Lot 1Q to which title has not been passed (T42-9 to 14).

The petitioner moved for dismissal at the second appeal before the Division of Tax Appeals as *res adjudicata* because of the prior adjudication of the same issues on the same property of the petitioner (T9-7 to 25) but the motion was denied without prejudice (Attachment E, p. 27). The court precluded an alleged oral settlement agreement from becoming part of a judgment,

N.J.S.A. 54:2-42. The court also held that the Borough of Hightstown cannot be included in the total area of petitioner's land since total area under N.J.S.A. 54:4-23.1 refers to computation of minimum area of 5 acres only where property extends into contiguous taxing district. The court held that Block 10 Lot 11 is the remainder of original Block 12 Lot 1. Block 1 Lot 4 and Block 11 Lot 22 together with Block 10 Lot 11 are in Hightstown and the total area is part of the remainder of original Block 12 Lot 1 in East Windsor and farmed as one unit, *supra.* The court held that no evidence was presented by petitioner relative to farming activity in East Windsor from 1969 through the fall of 1973, and that no evidence was presented by East Windsor, nor was any evidence presented by Hightstown. All appeals of petitioner were dismissed except those concerning rollbacks, which resulted in judgments for respondents.

The record indicates that judgment of the Division of Tax Appeals entered on February 26, 1975, together with the findings, and affirmance by the Appellate Division on January 13, 1976 held that farmland assessment was to apply to the said properties of the petitioner, *supra.* In the appeal before the Division of Tax Appeals heard on October 17, 1975, testimony of continued farming on the said premises during 1973 and 1974 was presented by the petitioner, by the respondent Borough of Hightstown (DbH-1, 2, 4) for 1970, 1971, 1972, and by its assessor as adverse witness on petitioner's behalf (T88-17, 18); by the assessor of the respondent Township of East Windsor (T81-20 to 24); both for continued farm use since the wheat crop, *supra,* grown and harvested was planted in 1973 and appeared in 1974. Continued farm use on these premises was presented for the petitioner by Paul Shepard to the present year (T21-6 *et seq.).* The tax court found that the petitioner failed to carry her

burden of proof for farming use for 2 years immediately preceding the tax years under appeal, that no evidence was presented by the respondent East Windsor or by the respondent Borough of Hightstown, and that when the judgments of 1973, *supra,* were entered in evidence together with petitioner's testimony that no change of use occurred, respondent was required to come forward with evidence that within 2 years after the judgment year, a change of use had taken place but the respondent failed to do so, and denied farmland or assessment for 1973 and 1974 on the petitioner's property in East Windsor and for 1973 and 1974 in Hightstown and gave judgments to respondents dismissing petitions and appeals of petitioner who now appealed again to the court of the Appellate Division.

The Appellate Division in its opinion (Attachment B, p. 16) entered November 15, 1977 on page 4 thereof stated that:

> "So far as concerns the remaining tax years in issue, 1971 and 1972, despite the comments and statements by the Division and the court concerning utilization of the land prior to the tax year there in question, the only findings of use essential to the determination of that case were that the land was devoted to the requisite agricultural use for the tax year (1973) and for the two successive years immediately preceding. As a result, East Windsor is bound by that decision only as to the years 1971, 1972 and 1973. Thus, except for the year 1971 there is here neither proof nor binding judgment that would establish that the parcels were devoted to

agricultural use during each of the two successive years immediately preceding each of the tax years 1971 and 1972 — *i.e.*, 1969 and 1970, and 1970 and 1971, respectively. Accordingly, the action of the Division in dismissing the appeals involving Block 12, lot 1 and Block 16, lot 2, for the tax years 1971 and 1972, and involving Block 12, lot 1A for the tax years 1973 and 1974, are affirmed."

The petitioner's appeal to the Supreme Court of New Jersey was dismissed without a hearing on May 30, 1978.

REASONS FOR GRANTING THE WRIT

Point I(a)

The same issues of farm qualification under the Farm Assessment Act of 1964, as amended, N.J.S.A. 54:4-23.1 *et seq.*, having been adjudicated by the Division of Tax Appeals in a prior appeal with findings of fact and affirmed by the Appellate Division is conclusive and *res adjudicata* as matter of public policy.

The Division of Tax Appeals entered judgments for the petitioner against the respondent Township of East Windsor February 26, 1976 qualifying the petitioner's property for farm assessment under the Farm Assessment Act of 1964, as amended, N.J.S.A. 54:4-23.1 *et seq.* for 1973 with findings of continuous agricultural use for 1970 through 1974 with benefits of Farmland Assessment Act for years 1971, 1972 and 1973 but

limited to 1973 conditionally because of agreement by the respondent East Windsor consenting to file with the court written stipulations of farm qualification only for 1973 (TA38, 39, 40) (TA4-10 to 17). These stipulations were never filed, and being oral were void and cannot be part of the consent judgment N.J.S.A. 54:2-42. The Appellate Division affirmed the judgments for 1973 and the findings of continuous farm use for 1970 through 1974, entered January 13, 1975. This matter once adjudicated became conclusive upon the parties and *res adjudicata* and the motion of petitioner for dismissal of the appeals in the second appeal by the respondent East Windsor, should have sustained as a matter of public policy, *Fayerweather v. Rich,* 195 U.S. 276, 49 L.Ed. 193; *Macfadden v. Macfadden,* 49 N.J. 356, 361, 362 (App. Div. 1958); *Public Service Gas & Electric Co. v. Waldroup,* 38 N.J. Super. 419, 425 (App. Div. 1955); *Dickinson v. Plainfield,* 116 N.J.L. 336, 338 (1935).

Point I(b)

A judgment of the Division of Tax Appeals and affirmed by the Appellate Division qualifying the petitioner's property for farmland assessment including contiguous areas under the Farmland Assessment Act of 1964, as amended, N.J.S.A. 54:4-23.1 *et seq.*, for 1973 with findings for years 1970 through 1974, but limited conditionally by agreement with the court to file written stipulations limiting the consent judgment to 1973 and which were not filed, and repudiated, is contractual in nature, executory, and the limitation is voided.

In the prior case before the Division of Tax Appeals heard on December 17, 1974 for farm assessment qualification of petitioner's property, the attorney for the respondent Township of East Windsor agreed with the court to submit signed stipulations whereby the judgment would be limited to the year 1973 rather than for all the years of 1971 through 1974 because of verbal consent therefore by the parties, but no signed stipulations were submitted and repudiated after the judgment entered limiting it to 1973. Under N.J.S. 54:2-42 no judgment shall be entered by the Division of Tax Appeals upon an oral consent or agreement. It is submitted, that the judgment being contractual and executory, specific performance is required in the consent judgment, *Macfadden v. Macfadden*, 49 N.J. Super. 356, 359 (App. Div. 1958); *Public Service Gas & Electric Co. v. Waldroup*, 38 N.J. Super. 419, 425 (App. Div. 1955) and the limitation to 1973 is not conclusive since voided. The findings by the Division of Tax Appeals that the petitioner's property qualified for farmland assessment under the said Farmland Assessment Act during 1971, 1972 and 1973 (TA40-2, 3, 4), were

affirmed by the Appellate Division which added thereto 1974 (Attachment B, p. 16). The findings are conclusive upon the parties in the present appeals where the record of the findings and judgment, and the affirmance of the Appellate Division thereof were put in issue, as well as the judgment which is conclusive and *res adjudicata, Macfadden v. Macfadden*, 361, 362, *supra*. Judicial admissions are binding on the joined parties throughout the entire litigation. The entire record is admitted in the second action, *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 66 L. Ed. 708. It is submitted that the judgments in these consolidated appeals rests on the joint litigants, the respondents herein, and are conclusive on all the issues jointly. The joined parties waived their rights for non-appearance, *e.g.*, by the Borough of Hightstown for not being an original party, *Blossom v. Milwaukee R. Co.*, 1 Wall. (U.S.) 655, 17 L. Ed. 2d 673.

Point I(c)

Due process under the Fourteenth Amendment of the United States Constitution is denied when the procedural burden of the petitioner for qualification for farmland assessment under the Farmland Assessment Act of 1964, as amended, N.J.S.A. 54:4-23.1 *et seq.* is carried by the record of judgments and findings of the Division of Tax Appeals in a prior appeal for the petitioner, and additional testimony by the petitioner in the second appeal for the same issues but the respondents do not come forward with any testimony and judgments are given against the petitioner, and is reversible error.

The judgments for the petitioner and findings (Attachment D, p. 24) for farmland assessment under the Farmland Assessment Act of 1964, as amended, N.J.S.A. 54:4-23.1 *et seq.*, for 1973, and 1971 through 1974 though limited conditionally to 1973 upon receipt of signed stipulations for such limitation which were never submitted to the Division of Tax Appeals (TA4-10 to 17) (TA38-22 *et seq.*) (TA40-2 to 11) are conclusive against the respondent East Windsor. The judgments, like contracts were executory and conditional on the entire matter of farm qualification for the petitioner for the years 1971 through 1974, *Macfadden v. Macfadden,* 49 N.J. Super. 356, 359 (App. Div. 1958); *Public Service Gas & Electric Co. v. Waldroup,* 38 N.J. Super. 419, 425 (App. Div. 1955) and the limitation to 1973 is voided by non-performance, leaving the findings of farm qualification for the petitioner for 1971 through 1973; 1974 was included by the Appellate Division (Attachment B, p. 16).

By joining in the present consolidated appeals (Attachment E, p. 27) and waiver of rights for non-appearance in prior judgments, *supra,* against the respondent East Windsor became conclusive on the respondent Borough of Hightstown having given petitioner farm assessment for 1971 and 1972 on all the issues. In the present appeals the petitioner gave testimony to the issues in the record and presented additional testimony for farmland assessment qualification under the said Act, *supra,* for 1973 and 1974, but the respondents came forward with no testimony. It is submitted that the procedural burden of the petitioner was carried successfully, and the judgments denying the petitioner farmland assessment under the said Act are arbitrary.

By joining of the respondent Borough of Hightstown with the respondent Township of East Windsor in the present appeal before the Division of Tax Appeals both respondents are bound by the record and all judicial admissions throughout the entire litigation. The entire record is admitted in the second action before the Division of Tax Appeals, *United Shoe Machine Corp. v. United States,* 258 U.S. 451, 66 L. Ed. 708. The Division had no jurisdiction, it is submitted, to relitigate the same issues for 1971, 1972, 1973 and 1974 and give judgment dismissing petitioner's appeals except 1973 herein; the Appellate Division reversed as to 1974 (Attachment C, p. 19), but not 1970, 1971 and 1972.

The petitioner, it is submitted, in being deprived of farmland assessment is required to pay additional market value taxes and thus deprived of property rights and equal treatment under the Fourteenth Amendment of the Constitution of the

United States because due process is denied herein, and is reversible error.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the Supreme Court of New Jersey.

Respectfully submitted,

Paul Shepard
Attorney for Petitioner (N.Y.)

August 25, 1978

ATTACHMENT A - ORDER OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY M-779 SEPTEMBER TERM 1977

LIVSHA SHAPIRO,

Petitioner-Respondent,

v.

TOWNSHIP OF EAST WINDSOR,

Respondent-Respondent.

and

LIVSHA SHAPIRO,

Petitioner-Respondent,

v

BOROUGH OF HIGHTSTOWN,

Respondent-Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss the appeal is granted.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 30th day of May, 1978.

s/ Stephen W. Townsend

ATTACHMENT B - 'OPINION OF THE APPELLATE DIVISION, SUPERIOR COURT OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A2293-74

LIVSHA SHAPIRO,

Petitioner-Appellee,

v.

TOWNSHIP OF EAST WINDSOR,

Respondent-Appellant.

Argued: December 15, 1975 - Decided: Jan. 13, 1975

Before Judges Allcorn, Kole and King.

On Appeal from Division of Tax Appeals, State of New Jersey.

Mr. Robert A. Gladstone argued the cause for Respondent-Appellant (Messrs. Warren, Goldberg and Berman, attorneys).

Mr. Paul Shepard argued the cause for Petitioner-Appellee.

PER CURIAM

Township appeals from the judgment of the New Jersey Division of Tax Appeals. The Division reversed the decision of the Mercer County Board of Taxation and entered judgment for taxpayer farmer holding that she qualified for farmland assessment status under the Farmland Assessment Act of 1964 for the tax year of 1973.

The evidence demonstrates that the land in issue has been continuously used as farmland through the year in dispute, 1973. The land was farmed by a tenant through the year 1970 when the tenant abandoned the property. The taxpayer attempted to productively farm the land during 1971 and 1972 but bad weather prevented the production of a commercially feasible soybean crop during those years. The taxpayer recovered some seed crop and some cover crop during those years. In the fall of 1973, the disputed year, taxpayer planted a wheat crop which the parties concede was commercially productive to the extent of at least $500 during 1974.

The Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 *et seq.* provides an alternative test for qualification. The statute provides (1) that land shall be deemed actively devoted to agriculture when the gross sales of such products average at least $500 per year during the two year period immediately preceding the subject tax year or (2) there is clear evidence of anticipated yearly gross sales averaging at least $500 within a reasonable period of time.

The judge of the Division of Tax Appeals specifically found that the property in dispute "had been engaged in the farming business in the State of New Jersey for a substantial number of years." The Division found that the aborted crop for the years 1971 and 1972 countenanced a reasonable expectation of a minimum yield in excess of $500 prior to destruction in whole or in part by the elements. Further the Division found that utilization of the aborted crop during the years 1971 and 1972 as organic fertilizer was actually production of a crop which exceeded $500 in value. The Division was further impressed by the fact that farm use was continuous and never abandoned and by the commercially productive crop of 1974 actually planted during the disputed year.

We affirm the determination of the Division of Tax Appeals in favor of farmland qualification for the year 1973. There is adequate credible evidence in the record to support the determination of the Division, giving consideration to its administrative expertise and the legislative intent. The Division's conclusion is consistent with the legislative purpose to provide tax relief where, as in the factual setting here, the statutory standards are met in the light of a continuous bona fide farming effort, allowing for the perils of endeavor. As has been previously stated the court is permitted to review the Division's findings of fact and make independent findings on an appeal such as this. "However, great weight must be placed upon the board's action unless it has arrived at its findings by manifest violation of law or by a clear abuse of discretion. We cannot disburb its findings where there is evidence which can reasonably support them." *Borough of Hasbrouck Heights v. Div. of Tax Appeals*, 54 N.J. Super. 242 (App. Div. 1959). The judgment below is affirmed.

ATTACHMENT C - [2]OPINION OF THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1794-76

LIVSHA SHAPIRO,

Petitioner-Appellant,

v.

TOWNSHIP OF EAST WINDSOR,

Respondent-Respondent.

LIVSHA SHAPIRO,

Petitioner-Appellant,

v.

BOROUGH OF HIGHTSTOWN,

Respondent-Respondent.

Submitted September 19, 1977 — Decided Nov. 15, 1977

Before Judges Allcorn, Morgan and Horn.

On appeal from New Jersey Division of Tax Appeals.

Livsha Shapiro, appellant, *pro se* (Paul Shepard, of the New York Bar, on the brief).

Warren, Goldberg & Berman, attorneys for respondent Township of East Windsor (James I. Warren, on the brief).

Mason, Griffin & Pierson, attorneys for respondent Borough of Hightstown (Kester R. Pierson, of counsel; Benjamin N. Cittadino, on the brief).

PER CURIAM

Following unsuccessful appeals to the Mercer County Board of Taxation, petitioner appealed to the Division of Tax Appeals from the action by the respondent municipalities denying the grant of farmland assessments to a number of parcels of property owned by her. N.J.S.A. 54:4-23.1, *et seq.* Inasmuch as the various parcels were contiguous to one another, and some of the tax years involved were the same, the cases were consolidated for hearing. After hearing, the Division dismissed all of the appeals by reason of petitioner's failure to sustain her burden of proof. The instant appeals are from those judgments of the Division.

EAST WINDSOR

Three of the parcels are situated in East Windsor: Block 12, lot 1 and Block 16, lot 2 which were appealed for the tax years 1971, 1972 and 1974; and Block 12, lot 1A which was appealed for the tax years 1973 and 1974. Although petitioner submitted evidence that East Windsor had granted farmland assessment for

the year 1975 and that the parcels were farmed in 1974 and 1975, there was no evidence submitted by the appellant that any of the three parcels had been farmed in the tax years in question (other than 1974) or during the two years immediately preceding each of the tax years under appeal, as required by the statute, N.J.S.A. 54:4-23.6(a). Thus, for the tax year 1971 there was no proof that the parcels were devoted to agricultural use for the years 1969, 1970 and 1971. For the tax year 1972, there was no proof of devotion to agricultural use for the years 1970, 1971 and 1972; and for the tax year 1974, there was no proof of devotion to agricultural use for the years 1972, 1973 and 1974. The East Windsor appeals were dismissed by the Division on the ground that appellant had failed to prove devotion to agricultural use for the two successive years immediately preceding each of the respective tax years under appeal.

The appellant urges, however, that inasmuch as the same issue was before the division, as well as before this court, for the tax year 1973, involving Block 12, lot 1 and Block 16, lot 2, and said lots were there determined as being qualified for farmland assessment for the tax year 1973, East Windsor is bound by that determination as to all three parcels (*i.e.*, including Block 12, lot 1A) for all of the tax years here in question, under the doctrines of *res judicata* (as to use in 1973) and collateral estoppel (as to use in 1971 and 1972).

The record in the case concerning the 1973 tax year (*Livsha Shapiro v. Township of East Windsor*, A-2293-74, an unpublished decision of this court decided January 13, 1976) reveals that the only findings and conclusions necessarily determined in the case as to use were limited to the tax year

there in question (1973) and to the two successive years immediately preceding the 1973 tax year. Consequently, such findings and conclusions would here affect only the tax year 1974 — *i.e.*, the prior decision established between the parties, devotion to farmland use only for the years 1971, 1972 and 1973 — and then only for the parcels there in litigation, namely, Block 12, lot 1 and Block 16, lot 2. The remaining parcel, Block 12, lot 1A was not involved in that appeal, and so the decision has no effect whatever on the proper assessment of such parcel. In these circumstances, the parcels in East Windsor known as Block 12, lot 1 and Block 16, lot 2, are entitled to be assessed as farmland for the tax year 1974, and the determinations of the Division are reversed as to that year.

So far as concerns the remaining tax years in issue, 1971 and 1972, despite the comments and statements by the Division and the court concerning utilization of the land prior to the tax year there in question, the only findings of use essential to the determination of that case were that the land was devoted to the requisite agricultural use for the tax year (1973) and for the two successive years immediately preceding. As a result, East Windsor is bound by that decision only as to the years 1971, 1972 and 1973. Thus, except for the year 1971 there is here neither proof nor binding judgment that would establish that the parcels were devoted to agricultural use during each of the two successive years immediately preceding each of the tax years 1971 and 1972 — *i.e.*, 1969 and 1970, and 1970 and 1971, respectively. Accordingly, the action of the Division in dismissing the appeals involving Block 12, lot 1 and Block 16, lot 2, for the tax years 1971 and 1972, and involving Block 12, lot 1A for the tax years 1973 and 1974, are affirmed.

HIGHTSTOWN

Three of the parcels which were denied farmland assessment for the tax years 1973 and 1974 were situated in Hightstown: Block 1, lot 4; Block 10, lot 11; and Block 11, lot 21. At the hearing before the Division, the appellant introduced no evidence whatever as to usage of the tracts for farmland in 1973 (an essential for both years appealed), taking the position that the determination by this court in the *East Windsor* case cited above was binding upon Hightstown by way of *res judicata* or collateral estoppel or both, inasmuch as all of the parcels in East Windsor and in Hightstown are contiguous. As indicated heretofore, Hightstown was not a party to the earlier case; there was no appeal taken by the taxpayer as to the Hightstown tracts; and, of course, the use of the lots in question was not litigated. Consequently, Hightstown is in no way bound by the determination in that case. *Bd. of Directors, Ajax, etc. v. First Nat. Bank of Princeton*, 33 N.J. 456, 463 (1960); *Restatement, Judgments* §93 (1942).

Accordingly, the judgments of the Division dismissing the 1974 appeals as to East Windsor [Block 12, lot 1 (L-4811-76) and Block 16, lot 2 (L-4816-74)] are reversed; the judgments of the Division dismissing the appeals for each of the tax years 1971 and 1972 involving Block 12, lot 1 and Block 16, lot 2 in East Windsor, and the appeal for each of the tax years 1973 and 1974 involving Block 12, lot 1A in East Windsor, are affirmed; the judgment of the Division dismissing the appeals for each of the tax years 1973 and 1974 as to Block 1, lot 4, Block 10, lot 11 and Block 11, lot 21 in Hightstown, are affirmed. No costs.

ATTACHMENT D - EXCERPTS FROM HEARING AND DECISION DATED DECEMBER 17, 1974 BEFORE DIVISION OF TAX APPEALS OF NEW JERSEY

* * *

[3]"THE COURT: These are Cases 3 through 8 inclusive.

MR. GLADSTONE: That's right, your Honor. I think we can stipulate in the beginning with respect to Cases 3 and 6, those are the 1971 appeals, contiguous lots of the same parcel. We have agreed that the property should be considered qualified as farmland for 1971 without prejudice as to whether crops were actually growing on the property at that time or not. Simply for the purposes of a stipulation, it will be considered as qualified farmland.

THE COURT: Now, land on Case No. 6 is assessed at $100. Will a different number be —

MR. GLADSTONE: No.

MR. SHEPPARD: Not as long as it's part of the same unit, too.

THE COURT: Right, That will remain the same. Now, on —

MR. GLADSTONE: With respect to Case No. 4 and Case No. 7 —

THE COURT: Right.

MR. GLADSTONE: Those are again contiguous lots of the same parcel for 1972. It has been agreed without prejudice that those lands should be deemed taxable at the fair market value and not [4] considered farmland.

THE COURT: Right.

MR. GLADSTONE: With respect to Case No. 5 and Case No. 8, contiguous parcels of the same property, we would like to be heard in a hearing before the Court.

THE COURT: Okay.

MR. GLADSTONE: As to whether those properties qualified for farmland assessment treatment.

THE COURT: Now, there's only one thing. Are you going to file stipulations with regard to 3, 4, 6 and 7.

MR. GLADSTONE: Yes.

THE COURT: Okay, you'll file stipulations on these. Then we only have to hear testimony with regard to Lot 1 in Block 12 and Lot No. 2 in Block 16 for the tax year of 1973.

* * *

[40]On that basis, I find that the taxpayer was entitled to the benefits of the Farmland Assessment Act for the years 1971, '72 and '73.

MR. GLADSTONE: Your Honor, we had already stipulated at the beginning of this matter —

THE COURT: Yes, I'm sorry.

MR. GLADSTONE: That for the year 1972 —

THE COURT: '72, I'm sorry, It will only be for the year 1973, which was the only matter that was actually presented to me.

MR. SHEPPARD: Thank you, your Honor.

MR. GLADSTONE: Thank you, your Honor.

* * *

I, THEODORE M. FORMAROLI, a Certified Shorthand Reporter and Notary Public in and for the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of my stenographic notes taken at the time and place hereinbefore set forth

s/ Theodore M. Formaroli
THEODORE M. FORMAROLI, CRS"

ATTACHMENT E - EXCERPTS FROM OPINION DATED NOVEMBER 4, 1976 BEFORE DIVISION OF TAX APPEALS OF NEW JERSEY

Nov. 4, 1976

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF TAX APPEALS

LIVSHA SHAPIRO,

Petitioner,

vs.

TOWNSHIP OF EAST WINDSOR,

Respondent.

LIVSHA SHAPIRO,

Petitioner,

vs.

BOROUGH OF HIGHTSTOWN,

Respondent.

* * *

APPEARANCES

PAUL SHEPARD, ESQUIRE
For the Petitioner, Livsha Shapiro

ROBERT A. GLADSTONE, ESQUIRE,
For Respondent, Township of East Windsor

KESTER R. PIERSON, ESQUIRE
For Respondent, Borough of Hightstown

Lario, P.J.

The true value of the lands and improvements involved in these appeals is not in dispute. Petitioner claims that she is entitled to a farmland assessment on the land in each case in both municipalities.

Since the land in both municipalities is contiguous and owned by the same owner, the cases were tried together.

Petitioner presented two judgments of this Division dated February 26, 1975 whereby Block 12, Lot 1 (docket #L 3502-73) and Block 16, Lot 2 (docket #L 3506-73) located in East Windsor were ajudicated as being entitled to a farmland assessment. These judgments were affirmed by the Appellate Division on January 13, 1976 (unreported — docket #A 2293-74).

Petitioner moved that summary judgment be entered in all the present cases by reason of (a) *res ajudicata* based upon the above judgments; (b) an alleged settlement agreement; and (c) Hightstown is bound additionally by reason of N.J.S.A. 54:4-23.18.

Petitioner's motion for summary judgment was denied without prejudice in that the appeals presented at this time for 1971, 1972 and 1974 as against East Windsor are for separate and distinct years.

N.J.S.A. 54:4-23.13 provides:

"Eligibility of land for valuation, assessment and taxation under this act (R.S. Cum. Supp. 54:4-23.1 *et seq.*) shall be determined for each tax year separately."

A taxpayer wishing to avail himself of the benefits of the Farmland Assessment Act must prove that he has qualified for each year in question. Under the Farmland Assessment Act it is possible for a landowner to qualify for one year and not qualify for another year.

Two appeals for the tax year 1973 vs. East Windsor are appeals from judgments entered by the Mercer County Board of Taxation assessing omitted roll back taxes under *Sec.* 23.8. Hence, *res ajudicata* does not apply, if the provisions of *Sec.* 23.8 have been established.

Res ajudicata cannot apply as to the Borough of Hightstown since it was not a party to the prior appeals wherein judgments were entered and in addition Hightstown's appeals cover separate tracts of land and additional years. Nor does N.J.S.A. 54:4-23.18 apply. This statute defines how total acreage is to be calculated in determining whether the 5 acre minimum has been complied with. Minimum acreage is not in issue.

Under N.J.S.A. 54:2-42, no judgment shall be entered by this Division in any appeal from a county board, "upon the *oral consent or agreement* of the taxpayer with the taxing district, municipality . . . or their respective attorneys, but the Division may enter judgments on such appeals, . . . upon the *written consents or agreements* of the taxpayer and the taxing district, municipality . . . or their respective attorneys, verified by qualified experts as to the facts therein alleged in support of the valuations therein consented to." (emphasis added). Since the parties have not complied with the above section, this Division is precluded from entering judgment based on an alleged oral settlement.

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